MICHAEL E. DUGGAN
PROSECUTING ATTORNEY

From the Desk of
TIMOTHY A. BAUGHMAN
CHIEF, RESEARCH, TRAINING, AND APPEALS

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5792
Fax (313) 224-8224
e-mail: tbaughma@co.wayne.mi.us.

September 27, 2003

Hon. Maura D. Corrigan
Chief Justice
Michigan Supreme Court

and

Justices of the Court:

re: ADM file 2002-34/Speeding up the appellate process

Dear Justices:

I thank the Court for having been given the opportunity to appear before it on September 25, 2003 to make a few comments in addition to those I have made in writing regarding the proposal by the Court of Appeals now before the Court that would eliminate stipulations to extend time to file briefs, and allow motions to extend only on good cause, with "workload" apparently not to constitute good cause (the reduction of the appellant's time to 42 days from 56 would not apply in criminal cases under the revised proposal). Having heard the comments of other members of the Bar, and listened to the questions and comments of justices of the Court at the hearing, I would request that the Court indulge me one last time as I make some further comments and suggestions. My comments relate, as might be expected, to prosecutors, but the funding issue–that prosecutors are funded by public money, and have only that staff that the funding agency–the county–is willing to provide, applies in a real way to criminal defense counsel as well, given that the vast majority of cases involve appointed counsel for the defendant. And I cannot set aside that Wayne County has, for reasons that involve politics and not public safety, reduced the Prosecutor's budget well in excess of $3,000,000 for the next fiscal year, which begins October 1, 2003, and the huge effect on staffing and workload that decrease will have.

Comments and Suggestions for Immediate Action

- **Suggestion: The Court of Appeals must cease charging motion fees to prosecutors in cases where the defendant as appellant is represented by appointed counsel.**

  Comment: This was the historical practice throughout my 28+ years of criminal appellate practice, and perhaps throughout the entire history of the Court of Appeals. It was changed by that court in 2002. The prosecutor is, in the great majority of cases, the appellee responding to appointed counsel. This new practice, coupled with the fee increase to $100, means that the prosecutors in this State can no longer file motions to extend time to file their briefs, which, given staffing levels because of the level of funding by the counties, are very often necessary for a timely brief. If this Court approves the elimination of stipulations the prosecutors will have fewer than 35 days to answer appellant's briefs (as service is always by mail, a point returned to below), because prosecutors have ceased filing motions to extend. And even if the Court keeps the stipulation in criminal cases, a motion to extend is often needed by prosecutors, and must now be foregone. Whether the motion to extend is the *only* method of extension (if the proposal of the Court of Appeals is adopted) or is supplementary to a stipulation (as is strongly urged here), the prosecutor can only make use of it if the fee requirement is eliminated, at least in cases involving appointed counsel. This is simply a return to historical practice

- **Suggestion: The Court of Appeals must cease the practice of requiring a "motion for leave to file" in conjunction with any late answer to a motion or application, with an accompanying filing fee.**

  Comment: Several years ago the Court of Appeals began the practice, which I must candidly state I find silly, of requiring that when an answer to a motion or application is filed after the time for filing specified in the court rules, it must be accompanied by a motion for "leave to file a late answer." Prosecutors complied, as they had to, with this new requirement, but now the requirement that the prosecutor pay a filing fee for all motions, even when defendant has appointed counsel, is causing prosecutors to cease filing answers when the answer is late–even by a day–putting even more of the prosecutor's work on the staff of the court. The Court of Appeals justifies its practice–which again, is ahistorical–by reference to the language in the rules that an answer may be filed "*within* 21 days of service" in the case of applications (MCR 7.205(C)), and "*within*" a

set number of days with regard to motions, the number of days depending on the sort of motion filed (MCR 7.211(B)). If the answer is not filed "within" the period set in the rules, then the logic of the Court of Appeals is that it may not be filed at all without leave of the court. By contrast, the rules of this Court state that a party "may file" an opposition *before* the day the application is noticed for hearing, MCR 7.302(D). By the logic of the Court of Appeals, an answer filed *after* that time should require a motion for permission to file a late answer. But *this* Court has no such requirement. The practice should be consistent, and made consistent by eliminating the "motion for leave to file a late answer" in the Court of Appeals. If the answer is received too late to be considered by the court, then the responding party simply loses that opportunity; if received late but the court is still considering (or, as frequently, has not yet even begun to consider) the matter, then the answer will be taken into account. But the practice of the additional paperwork–and now, with the change in practice by the Court of Appeals, the accompanying fee that prosecutors must pay in all cases–should be ended *immediately*. The continuance of the practice with the fee will simply mean more work is placed on the staff of the Court of Appeals and on the judges, as prosecutors, when late in answering, even by a day, as will often happen giving staffing and workload, will and are being forced to simply forego filing answers to appellate motions and applications for leave to appeal.

- **<u>Suggestion</u>: The rule on responses/answers should be amended to take into account service by the moving party by mail.**

  <u>Comment</u>: Because service of briefs and motions is made by mail in all but a small number of cases, at least three days are lost from the time given in the rules to respond to the brief, motion, or application. There is a commonly employed method of restoring the time to the responding party that does not require any further policing by the Court of Appeals (or this Court) than currently undertaken. The Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Appellate Procedure all provide that when service is made by mail 3 days are added to the responding parties time allowed under the court rules. Below is a proposed rule–that could be quickly adopted–taken verbatim from FRAP 26(c).

> ***Additional Time After Service***. *When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.*

- **<u>Suggestion</u>: The rule permitting any sort of post-conviction motion to be filed in the trial court within the time for filing the appellant's brief without a remand from the Court of Appeals should be eliminated.**

  <u>Comment</u>: If the Court of Appeals is concerned about control of its docket–something Chief Judge Whitbeck suggested with regard to the elimination of stipulations–then the rule permitting post-conviction motions in the trial courts after the claim is filed, and without a remand from the Court of Appeals, should be eliminated, as in these cases the Court of Appeals virtually loses complete control of the case. These motions can languish for months and months, and may be employed effectively as a way to gain lengthy extensions of time to file the appellant's brief. As I suggested in my first letter to the Court, MCR 7.208(B) should be eliminated.

<u>Comments and Alternative Suggestion on Briefing Times</u>

Though I regret being repetitive, I think it simply cannot be overemphasized that criminal appeals are different than civil appeals in that the funding for the attorneys on both sides is public funding, and, in the case of prosecutors, entirely institutional. To shorten the time for answering briefs without the provision of additional resources–which the County in Wayne, and, as newspaper accounts indicate, elsewhere in the state as well, are not going to provide, but instead are going to reduce–will not accomplish the goal of speeding the appellate process. It simply cannot. It can only cause all prosecutors briefs to be late, with the forfeiture of oral argument. But this does not result in any expedition of the appellate process, and, if that is the point, is thus pointless, and, indeed, counterproductive to a rational appellate process given the loss of oral argument by prosecutors. Eliminating or reducing the Court of Appeals warehouse is understood to take additional attorney resources for the Court of Appeals; filing briefs more quickly would take additional attorney resources for prosecutor's offices. Those resources are *not* going to be supplied by the counties.

Because criminal appeals are fundamentally different for this reason–the lawyers are paid by public funds, and must carry the workload that the allocation of resources by their funding agencies requires–there is a sound reason for treating them differently than civil appeals. In so saying, I do not disparage the concerns of the civil bar that I heard at the Administrative Hearing on September 25, 2003; those concerns are, however, driven by different predicates than exist with criminal appeals. To that end, then, I suggest that whatever is done with civil appeals, criminal appeals be *left alone*; that is, the 28-day stipulation, and the 28-day presumptive extension (any further extension being extraordinary) be maintained as necessary given the resources available on

both sides because of the public source of limited funding and staffing. I do not think it inappropriate for the Court to determine that the ABA goal of 12 months for the appellate process is not realistic for a large number of criminal cases. And it may well be that the improvements in transcript and record production, as well as the suggestions I have made previously for fine-tuning the process–reducing the time for a claim of appeal, for the appointment of counsel, and the like–will render criminal appeals sufficiently expeditious to satisfy the concerns of justice that delay causes. After all, justice is compromised more by a shoddy appellant's brief or appellee's brief, caused by an unrealistic deadline when workload and staffing are taken into account, than by several additional months taken to complete the process.

As the chart employed in my first letter–and reproduced here but modified with briefing times fully restored in criminal cases–demonstrates, if the appellant's time is *not* reduced in criminal cases, as the Court of Appeals now proposes be the case, its proposal restoring 56 days to the appellant in criminal cases, and if the stipulation is *kept* and at 28 days, and an extension for 28 days is also *kept* as is now the practice–in short, if criminal appeals are left alone with regard to briefing times–then if one assumes that one 14 day extension might often be granted in criminal cases under the Court of Appeals proposal, if the other modifications I suggest are made the savings in time would be only *35 days fewer* than those proposed by the Court of Appeals. Is that not sufficient? Does reducing the appellate process another 35 days, and the shoddy work and/or loss or oral argument it will entail, justify shortening the briefing times? Is the game worth the candle?

But if the Court nonetheless believes some change necessary in criminal appeals, then I return to the alternative I suggested in my first letter. As I noted then and at the Administrative Hearing, I do not suggest for a moment that prosecutors can meet even the shortened deadlines contained in my proposal in a large number of cases–*and if the fee remains for motions to extend then they will not be filed in any event, and so all the prosecutor will have is a reduced stipulation time, which will very often be inadequate*. But the alternative is better than the proposal of the court.

Let me say just a word about differentiated case management on appeal. It *might* be workable, but as public agencies currently staff prosecutor's offices might well not be. The complex case that is given more briefing time in differentiated case management is precisely the one that needs to be finished on time, resulting in the cases that are given shorter time being moved to the "back burner," and often then taking more time than the more complex case. And frequently very short records and one-issue briefs can be very complex–I have had several such cases go all the way to the United States Supreme Court. Finally, the nicely turned phrase from the hearing–"predictable flexibility"–is essential in criminal appeals. Generally, a prosecutor cannot file a motion to extend time justifying a precise number of days, as the reason the extension is needed is that in juggling 8 appeals, 4 evidentiary hearings, and 6 trial and appellate motions the assistant prosecuting hasn't had a chance to do more than just look at the file and obtain the transcript. The differentiated case management experiment, if it is to be undertaken, might best begin on the civil side.

MODIFIED COMPARISON CHART
(BRIEFING/EXTENSION TIMES LEFT UNCHANGED)

Current

Appointed	Retained	Proposed	Alternative
Request for appointment of counsel: 42 days		No change	Request for appointment of counsel: 28 days (14-day reduction)
Appoint counsel/ Claim: 14 days	Claim: 42 days	No change	Appoint counsel/Claim: 14 days Retained Claim: 28 days
Transcript filing: 91 days (extensions possible)	Transcript filing: 91 days (extensions possible)	No change	Transcript filing: 42 days 1000 pages or less (extensions possible for larger transcripts) 49-day reduction)
Appellant's Brief: 56 days	Appellant's Brief: 56 days	Proposal modified by COA to restore 56 days	Appellant's Brief: 56 days
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 28 days
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 28-day extension generally permitted
Appellee's Brief: 35 days	Appellee's Brief: 35 days	No change	No change
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 28 days
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 28-day extension generally permitted
Total: 350 days	**Total: 336 days**	**Reduction of 98 days, assuming the grant of one 14-day extension in many cases**	**Reduction of 63 days assuming the grant of one 28 day extension in many cases**

COMPARISON CHART
(EXTENSION TIMES REDUCED)

Current

Appointed	Retained	Proposed	Alternative
Request for appointment of counsel: 42 days		No change	Request for appointment of counsel: 28 days (14-day reduction)
Appoint counsel/ Claim: 14 days	Claim: 42 days	No change	Appoint counsel/Claim: 14 days Retained Claim: 28 days
Transcript filing: 91 days (extensions possible)	Transcript filing: 91 days (extensions possible)	No change	Transcript filing: 42 days 1000 pages or less (extensions possible for larger transcripts) 49-day reduction)
Appellant's Brief: 56 days	Appellant's Brief: 56 days	Proposal modified by COA to restore 56 days	Appellant's Brief: 56 day (modified COA proposal)
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 21 days (7-day reduction)
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 21-day extension generally permitted (7-day reduction)
Appellee's Brief: 35 days	Appellee's Brief: 35 days	No change	No change
Stipulation: 28 days	Stipulation: 28 days	Elimination	Stipulation: 21 days (7-day reduction)
Extension: one 28 day extension generally permitted	Extension: one 28 day extension generally permitted	Elimination except on good cause justifying specific number of days requested	Extension: one 21-day extension generally permitted (7-day reduction)
Total: 350 days	**Total: 336 days**	**Reduction of 98 days, assuming the grant of one 14-day extension in many cases**	**Reduction of 91days assuming the grant of one 21 day extension in many cases**

I will not burden the Court by repeating my proposed amended court rules to accomplish the above results, but refer the Court to my original letter.

In conclusion, I urge the Court to, for the reasons advanced, treat criminal appeals as essentially *sui generis*, and leave the briefing schedules, including the available extensions, as is, and to act *immediately* to end the Court of Appeals practice of charging prosecutors motion fees in cases where defense counsel is appointed.

Sincerely,

TIMOTHY A. BAUGHMAN
Chief of Research,
Training, and Appeals
1441 St. Antoine
Detroit, MI 48226
313 224-5792